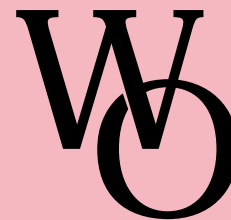


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# Wilson & Orcutt, P.C.

## Business Law Newsletter

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## A Wage And Hour Issue

**Sometimes the best of intentions creates rather than solves a problem.**

Take the case of a good and loyal employee working a standard work week of 9:00 AM to 5:00 PM Monday through Friday (i.e. 40 hours per week). The employee asks for time off to attend to personal business, and offers to “make the time up”. You agree, and the next week the employee comes in on Saturday, working a total of 44 hours for the week.

The employee is pleased that you were so accommodating, and you are happy that all necessary work got done. However, you have violated federal law.

The Fair Labor Standards Act is enforced by the Department of Labor, and its requirement that employees be paid at least one and a half times their regular hourly rate for all time worked over 40 hours in any work week can not be modified, even by mutual agreement. Thus while it is perfectly okay for the employee to make up the time during the same week it is taken, this rule applies if the extra time is scheduled at the employee’s convenience during the following week, and the rule applies even if the employee is paid a weekly salary rather than an hourly wage. Strangely enough, you are permitted to deduct money from the employee’s check for the personal time taken, and you are even permitted to refuse to grant the request for the time off. You just cannot let the employee work more than 40 hours without paying overtime.

There are some limited exemptions from this rule, for professional, executive and administrative employees and for outside sales personnel and other specific job categories. However, those exemptions are very narrowly defined, and misclassifying an employee as exempt can produce expensive consequences. It is not unusual for office employees (who most often do not meet the administrative exemption) to work more than 40 hours in a week. If they are salaried, the probability is that no contemporaneous time records are kept. The Department of Labor usually goes back two years in cases where it believes it has found unpaid overtime, and without records it may rely upon the employee’s memory in fixing damages. The back pay ordered can reach astronomical levels.

If there is any question of your employees’ coverage under the Act, a thorough review of your payroll policies may be in order.

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# The Small Business Job Protection Act Of 1996, How It Affects Small Businesses

The 1996 round of tax law revisions contain many tax law changes affecting small businesses, some of which might benefit you.

## Deductions of Equipment Expenses

The cost of otherwise depreciable assets that can be deducted annually, under IRS Code § 179, has been increased, on a sliding scale, from \$18,000 to \$25,000 for tax years 1997-2002.

## Safe Haven Rule For Independent Contractors

The law in this frequently litigated area has been modified to create a safe haven. You may treat a worker as an independent contractor regardless of the worker's actual status under the old common law definition, so long as a reasonable segment of your industry (at least 25%) treats such workers as independent contractors, unless you have no reasonable basis for such treatment.

## Major Changes To S Corporation Rules

The rules for S Corporations have been widely liberalized so as to make them more flexible:

- S Corporations are now allowed to have 75 shareholders
- The types of trusts that can be S Corporation shareholders has been expanded
- Inadvertently, defective elections can now be remedied
- S Corporations are now permitted to own subsidiaries
- S Corporations are now eligible for capital gains treatment for subdivided real estate

## Small Business Retirement Plans Are Now Simple

Until now, few small businesses have adopted 401(k) retirement plans, primarily because of the complex rules for qualification and plan administration.

The new law provides for Savings Incentive Match Plans for Employees (SIMPLE Plans) which are essentially simplified 401(k) plans under which a small business can fund IRA's for employees without having to comply with the old discrimination rules. While SEP/IRA Plans already in existence as of December 31, 1996 are grandfathered, no new such Plans may be created after that date.

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# The Race Is On For Internet Domain Names

Your company may not be on the internet now, but it well may have to be in the future if it is going to compete in the 21st century. Your competitors are already placing their claims on so called domain names, the e-mail and World Wide Web addresses used in cyberspace.

The best names are the ones that immediately identify you, and your “perfect” name may already be taken. The domain name “Fidelity.com” is owned by a west coast investment company nobody has heard of. Giant Fidelity Investments of local fame waited too long and had to settle for “Fid-Inv.com”.

Registration of a name is first come-first served, and you can file on your

own with Network Solutions, Inc. of Herndon, Virginia, a private firm contracted to handle all U.S. internet registrations by the National Science Foundation. However, it is easier to use the service of a local Internet access provider.

Be aware, though, that registration does not protect your choice of domain name under trademark law. Choose your name wisely. If there is any doubt, have a trademark search done before you register. If you already have a trade name or trademark, use it. You can find out if your choice is available for registration by checking on the Web at <http://rs.internic.net/cgi-bin.whois>.

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# The Landlord Almost Always Wins, Naturally

We are often asked whether a landlord is liable to someone who is injured as a result of a slip or fall on snow or ice.

In Massachusetts, landlords are **not liable** to someone who slips and falls on a natural accumulation of snow or ice. No matter how bad the storm, and no matter how slippery the ice, so long as the landlord does nothing to disturb the course of nature, a claim is doomed to fail. However, if the landlord does plow or shovel the snow, but does it negligently so as to leave an unreasonably (and unnaturally) dangerous surface, there is liability.

- **But Landlords Beware**

Of course, there are always exceptions to the general rule. A landlord might be liable, even if a snowfall is not disturbed, if the character of the accumulation changes over time because of non-weather factors; for example, if foot or

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vehicular traffic packs snow down to create a sheet of ice, and sufficient time passes so that the landlord has time to become aware of the danger and take appropriate action. On the other hand, ice formed from snow solely as a result of solar heating might not result in liability.

Likewise, there might be liability if only a portion of a sidewalk or driveway is plowed, resulting in a flow of water to another area where an “unnatural” accumulation of ice is formed.

Each case must be decided on its own set of facts, and it is not always easy to tell the difference between natural and unnatural accumulations. Likewise, whether plowing or shoveling is done negligently is ultimately up to a jury to decide.

However, the point is clear. If you do clear the snow, do a thorough job.

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## Notes of Interest

As has been widely publicized, a new state law requires that employers with 6 or more employees adopt a sexual harassment policy. The new law also encourages employers to provide training and education in this field. Such training should cover the responsibilities of supervisory employees steps that should be taken to ensure immediate and appropriate corrective action in response to a complaint.

Wilson & Orcutt, P.C. offers sexual harassment training, specifically tailored to your work environment and to your corporate culture. As with all issues of potential business liability, the best way to avoid claims is to train and educate employees in preventing sexual harassment in the work place.

### **The Wilson & Orcutt, P.C.** **Business Law Newsletter**

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